

In The Matter Of:

*AMERICAN ZURICH INSURANCE COMPANY, ET AL v.
J. CRISMAN PALMER, ET AL*

*WITNESS: J. CRISMAN PALMER
August 31, 2022*

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<p style="text-align: right;">Page 9</p> <p>1 Q When was that? 2 A I'm trying to differentiate. Pardon me for 3 pausing. We moved offices about 11 years ago, so 4 I was trying to think what office I was in at the 5 time. Probably 12 or 15 years ago. 6 Q Was that a bad -- a bad faith worker's comp case? 7 A No. It was a UIM. 8 Q Did you give a deposition in that case? 9 A I did. 10 Q Prior to the case we're here to talk about, had 11 you handled worker's comp bad faith cases on 12 behalf of Zurich? 13 A No. 14 Q This was a -- the case we're here to talk about 15 was your first one for Zurich? 16 MR. SUTTON: First worker's comp -- 17 Q (BY MR. HOYT) First worker's comp bad faith? 18 A I believe so. I believe I had done one bad faith 19 for Zur -- case for Zurich prior to this, but I -- 20 I'm struggling to remember whether it was Zurich 21 or USF&G, but I -- we do Zurich work in our 22 office, but I didn't do any Zurich work. I only 23 was called in on the bad faith side. 24 Q So without confining it to a bad faith worker's 25 comp, had you handled bad faith cases for Zurich</p>	<p style="text-align: right;">Page 11</p> <p>1 MR. SUTTON: What I would -- and it's up to 2 you. What I would suggest, and what's commonly 3 done, Scott, is we just continue numerically 4 numbering as we go so that we don't have multiple 5 Exhibit 1s later on in time. I don't care if you 6 do the plaintiffs or not, but -- 7 MR. HOYT: Well, that's -- I like that 8 approach, but I was going to -- well, I see where 9 you're going. If we start with plaintiffs' 1 and 10 then you do defendants' 1, we got multiple 1s. 11 We'll try that. And I'm going to be -- I mean, we 12 have a deposition of Mike Ab -- I don't know how 13 to say it. 14 THE WITNESS: Abourezk. 15 MR. SUTTON: Abourezk. 16 MR. HOYT: -- Abourezk tomorrow so I'll -- 17 you're going to be the court reporter for that -- 18 so she can bring these exhibits to the extent I 19 need to use them then. So these are -- this is 20 not what I wanted. 21 I'm going to mark the guidelines. This is 22 Exhibit 1. 23 MR. SUTTON: Yep. 24 (Whereupon, Exhibit 1 was then marked.) 25 Q (BY MR. HOYT) Mr. Palmer, I'll have you look at</p>
<p style="text-align: right;">Page 10</p> <p>1 prior to the claim that we're talking about? 2 A I'm not sure. I'm not being evasive. There might 3 be one, but I'm not -- I remember an individual 4 that was I thought with Zurich at the time, but 5 now I'm not as sure. They might not have been 6 with USF&G. 7 Q So let's broaden the scope even more. Had you 8 handled insurance defense cases for Zurich prior 9 to the claim we're here to talk about? 10 A No. Me personally, no. Our firm, yes. 11 Q Your firm. All right. Let's -- let's talk about 12 the case, and I'll call it the -- the Leichtnam 13 case. Is that how you pronounce that name? 14 A I think it's Leichtnam, but -- 15 Q Leichtnam. Okay. Let's talk about that case. 16 A Sure. 17 Q How did that case come to you? 18 A I got a call from somebody at Zurich which I 19 presume was Dawn Wagner, but I don't know that for 20 a fact. 21 Q And did they say why they were calling you? 22 A I -- I don't recall. I don't know why they were 23 calling me. 24 MR. HOYT: Let me mark as Exhibit 1 -- I'm 25 going to mark these as plaintiffs' exhibits.</p>	<p style="text-align: right;">Page 12</p> <p>1 these. You are free to look at as much as you 2 want, but maybe I can direct your focus more to 3 just the question I intend to ask which is 4 generally if you recall seeing these guidelines 5 from Zurich at the beginning of your retention 6 with them on this case? 7 A Do I remember receiving them, no. Do I -- do I 8 acknowledge I received them, yes. 9 Q All right. Was this the first time you had seen 10 these guidelines or had you received them for 11 the -- the prior one or two cases you handled for 12 Zurich? 13 A I don't know the answer to that question. 14 Q And you understood in getting these that -- that 15 Zurich was providing them to you to show you what 16 they expected in terms of the guidelines they 17 wanted you to follow? 18 A I do. 19 Q Now, let's look at pages 2 and 3 of the actual 20 guidelines. And the -- the guidelines are 21 actually -- there is a -- there is a -- kind of an 22 overview and then there is paginated pages. And 23 I'm referring to the pages that have one and -- 24 two and three at the bottom. It says, Guidelines 25 for litigation matters.</p>

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<p style="text-align: right;">Page 13</p> <p>1 A I'm sorry. 2 Q If you look at the bottom of the page, you need to 3 go further to get to the -- where it starts with 4 the pack page numbers. 5 A Oh. I thought the Zurich 2 is what you were 6 talking. 7 Q There. I think you are in the numbering sequence 8 there. So if you go to page 2 and 3 of that. 9 MR. SUTTON: I think he wants you at 10 Bates stamp 3016. 11 Q (BY MR. HOYT) Yeah. Yeah. 12 A Oh. 13 Q 3016 Bates stamp. I'm probably confusing you. 14 I'm referring right now to the little page number 15 at the bottom. 16 A Oh, okay. Okay. I was going to say, they are all 17 2, but -- 18 Q Yeah. There are multiple numbers. Sorry about 19 that. 20 A That's okay. Okay. I've got it. 21 Q Okay. So appears a list of guidelines for 22 litigation matters. Do you see that? 23 A I do. 24 Q Do you recall receiving -- receiving those 25 guidelines and following those in the prior Zurich</p>	<p style="text-align: right;">Page 15</p> <p>1 things. And one of them in item 2, B2, is 2 identification and assessment of key issues 3 including likelihood for success on the key 4 issues. Do you recall providing -- and let me -- 5 I believe you mentioned Dawn Wagner. You believe 6 she was your contact on the case? 7 A I know that she was my contact. I didn't know if 8 she was the initial, but, yes, she was the 9 contact. 10 Q All right. Can you remember any other contact you 11 reported to? 12 A No, I cannot. 13 Q All right. So do you recall within 90 days of the 14 assignment providing Dawn Wagner with your 15 identification and assessment of key issues and 16 likelihood for success? 17 A I do not recall that. 18 Q Item 3, a litigation plan, do you recall providing 19 her with a litigation plan that I -- identified 20 the four items, sub A through D? 21 A I do not recall. 22 Q Did you ever provide her with a litigation plan 23 that identified these items? 24 A I don't know the answer to that. Whatever I did 25 is in the file.</p>
<p style="text-align: right;">Page 14</p> <p>1 cases that you had handled? 2 A Just so we're clear, I'm not positive I handled 3 any prior Zurich cases. I said I maybe did one. 4 Q Okay. 5 A I don't know whether it was Zurich or USF&G. But 6 I acknowledge receiving these, but I can't tell 7 you that I have any for a previous case. 8 Q All right. You did review them for this case? 9 A I'm sure I looked at them. 10 Q All right. And so you saw the reporting 11 requirements listed under Roman Numeral II? 12 A I see the reporting requirements. 13 Q Do you recall within 30 days of receiving the case 14 sending the report that's outlined there? 15 A I do not. 16 Q And then if you go to B, initial case report 17 budget, there is another report called for 90 days 18 from receipt of the assignment. Do you recall 19 providing that report? 20 A I do not. 21 Q Do you believe you did or you just -- you can't 22 recall it or -- or you didn't? 23 A I don't know one way or the other. 24 Q So the -- the report that's called for under item 25 B says no later than 90 days calls for a number of</p>	<p style="text-align: right;">Page 16</p> <p>1 Q All right. But as you sit here you can't recall a 2 specific litigation plan that identified 3 discovery, motions, significant activity? 4 A I do not recall. 5 MR. HOYT: Let's mark as Exhibit 2 the 6 Leichtnam Complaint in this matter. 7 THE WITNESS: Oh, sorry. 8 MR. HOYT: She'll give you that copy. 9 (Whereupon, Exhibit 2 was then marked.) 10 Q (BY MR. HOYT) And can you identify this as the 11 Complaint that you were retained to defend? 12 A It would certainly appear to be. 13 Q And did you receive this upon your retention from 14 Zurich? 15 A I'm going to assume so. 16 MR. HOYT: Let's mark as Exhibit 3 the 17 Gunderson Palmer billing records for this. 18 (Whereupon, Exhibit 3 was then marked.) 19 Q (BY MR. HOYT) And I'll start with the general 20 question, if you can identify these as the billing 21 records of Gunderson Palmer for this matter? 22 A I'm going to assume they are. I haven't looked 23 through every one of them, but I -- I know that 24 they were provided to my counsel who I presume 25 provided them to you.</p>

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<p>1 medical summaries as well as summaries of the 2 claim file.</p> <p>3 Q (BY MR. HOYT) Okay. And do you -- is that what 4 you're recalling?</p> <p>5 A Yes.</p> <p>6 Q And you recall those were prepared by Beth Young 7 about the time frame we're looking at early on?</p> <p>8 A I -- the time frame I don't know. I know that 9 Beth was preparing them. When she's reviewing 10 these, at the same time she's taking notes to 11 prepare the summaries. And whether they are 12 exactly contemporaneous with those dates, I don't 13 know.</p> <p>14 Q All right. Now, it looks like from the time 15 records you obtained two extensions of time from 16 Michael --</p> <p>17 A Abourezk.</p> <p>18 Q -- Abourezk --</p> <p>19 A That could be.</p> <p>20 Q -- to answer it?</p> <p>21 A Without looking, I wouldn't know.</p> <p>22 Q Well, let's look.</p> <p>23 A Okay.</p> <p>24 Q So there is -- there is an entry on 3/26 on the 25 first page that says review -- receive review</p>	<p>1 THE COURT REPORTER: 4.</p> <p>2 MR. HOYT: That's responses and objections to 3 plaintiffs' second set of requests for admissions 4 to defendants.</p> <p>5 (Whereupon, Exhibit 4 was then marked.)</p> <p>6 Q (BY MR. HOYT) Generally can you identify these as 7 responses to requests for admissions that you 8 reviewed and approved?</p> <p>9 A Yeah, I would say that's true.</p> <p>10 MR. HOYT: Yeah, I don't -- did you get me 11 verification for these, because I don't have it 12 with this copy?</p> <p>13 MR. SUTTON: Request for admissions wouldn't 14 require verification. Only interrogatories. 15 They're signed by counsel.</p> <p>16 MR. HOYT: Well, it's general practice to 17 also have their client verify them. But, anyway, 18 he stands by them, so that's fine with me.</p> <p>19 Q (BY MR. HOYT) If we look at 45 -- Request For 20 Admission 45 --</p> <p>21 A Yes.</p> <p>22 Q -- it asks, Admit you did not research any 23 potentially applicable defenses to assert on 24 behalf of AZIC in the bad faith action. And it 25 appears that you admitted that with an</p>
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<p>1 email from attorney Michael Abourezk approving 2 extension of time to file an answer.</p> <p>3 A Okay. I see that.</p> <p>4 Q So that -- that's one. And then if you look down 5 at 4/15 at the very bottom. Correspondence to 6 attorneys Mike Simpson, Mike Abourezk, regarding 7 request for further extension of time in order to 8 file answer in order to finish review of 9 voluminous documents from clients.</p> <p>10 A I see.</p> <p>11 Q So two extensions it looks like --</p> <p>12 A Yes.</p> <p>13 Q -- correct?</p> <p>14 And so with those extensions you believed you 15 had sufficient time to prepare an Answer for this?</p> <p>16 A Yes.</p> <p>17 Q And that you had sufficient time to identify any 18 issues to raise in that Answer?</p> <p>19 A Yes.</p> <p>20 Q But there was no research done during that period 21 of time into possible legal defenses, was there?</p> <p>22 A Not that I see in the billings.</p> <p>23 Q Well, and if we look at -- let's see -- I'm going 24 to mark this as Exhibit --</p> <p>25 MR. HOYT: What are we up to, 4?</p>	<p>1 explanation, but it does appear that you admit, if 2 you go to the response, that no research was done, 3 correct?</p> <p>4 A Okay.</p> <p>5 Q And so let's look at the Answer.</p> <p>6 MR. HOYT: And we'll mark that as Exhibit 5. (Whereupon, Exhibit 5 was then marked.)</p> <p>7 A Okay.</p> <p>8 Q (BY MR. HOYT) This is the Answer that was -- that 9 was filed to the Complaint we looked at, correct?</p> <p>10 A Yes.</p> <p>11 Q Who drafted this?</p> <p>12 A I did. With input from others.</p> <p>13 Q Who else had input?</p> <p>14 A Jana Smoot White.</p> <p>15 Q And what was her position?</p> <p>16 A She was a lawyer in our office at that time.</p> <p>17 Q What level of experience was she?</p> <p>18 A She joined our firm -- she practiced law in 19 Kentucky for nine years and had been with us for 20 probably -- I'm not sure -- two or three years at 21 that time.</p> <p>22 Q What was her -- her experience with worker's comp 23 bad faith?</p> <p>24 A I don't know what her experience with worker's</p>

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<p style="text-align: right;">Page 25</p> <p>1 comp bad faith is. I know that she had extensive 2 experience in bad faith in the state of Kentucky 3 and that's why I had enlisted Jana to assist in 4 what bad faith cases we had.</p> <p>5 Q What input did she provide on this Answer?</p> <p>6 A Specifically I don't know. Jana and I would have 7 talked about it. We always talked about how to 8 respond and --</p> <p>9 Q Okay. Anybody else provide input?</p> <p>10 A Not to my knowledge.</p> <p>11 Q All right. So you got two extensions of time and 12 had your paralegal review 1,800 plus pages of 13 documents and you filed a two-page Answer without 14 any affirmative defenses. And so nothing that -- 15 nothing that was found in that review, nothing 16 that was determined in that period of time led you 17 to believe that there were any potential defenses 18 for this matter?</p> <p>19 MR. SUTTON: Object to the form of the 20 question.</p> <p>21 A At that time it did not.</p> <p>22 Q (BY MR. HOYT) You also filed this Answer without 23 providing a draft to the client for review prior 24 to filing, correct?</p> <p>25 A I don't have a recollection, but I do after the</p>	<p style="text-align: right;">Page 27</p> <p>1 drafts of answers for the client's review before 2 filing?</p> <p>3 A I don't know that I had prior cases with Zurich. 4 As I said earlier, this was the first case I know 5 I had for Zurich. It was -- I thought there might 6 have been one before that.</p> <p>7 Q All right. So the answer was filed -- let me look 8 at that Answer. It looks like it was filed on 9 April 30 if you look at the Certificate of 10 Service, correct?</p> <p>11 A Yes.</p> <p>12 Q You had been retained over 30 days before that. 13 The guidelines we looked at required a report 14 within 30 days of retention to identify the 15 issues.</p> <p>16 What had you done in that 30-day period, if 17 anything, to identify issues and defenses in this 18 matter?</p> <p>19 A I had reviewed the re -- the materials they had 20 provided. I had also had a conversation with 21 Bill Fuller, the lawyer who represented Zurich in 22 the underlying work comp matter.</p> <p>23 Q When did you have that conversation?</p> <p>24 A Without looking at billing records I don't know.</p> <p>25 Q Well, let's look at them.</p>
<p style="text-align: right;">Page 26</p> <p>1 fact, yes, I think I did.</p> <p>2 Q Now, that wasn't your usual practice, was it?</p> <p>3 A Depended on the client, but probably not my usual 4 practice.</p> <p>5 Q In fact, if we look back at those guidelines, 6 Exhibit 1, if you would pull that out --</p> <p>7 A Oh, sure. I'm sorry.</p> <p>8 Q -- and go back to those pages again, page 3 in 9 particular. The Bates number is 3017.</p> <p>10 A 3017?</p> <p>11 Q At the bottom, yeah.</p> <p>12 A Okay.</p> <p>13 Q The very last entry there says, Draft should be 14 transmitted in time for the corporate law attorney 15 to provide substantive comments and proposed 16 meaningful revisions.</p> <p>17 A It -- it does.</p> <p>18 Q And that -- you did not follow that guideline 19 here?</p> <p>20 A I did not.</p> <p>21 Q Now, let's look at the Answer. Is there any 22 reason why you didn't?</p> <p>23 A I don't know. I don't have a recollection of what 24 took place at the time.</p> <p>25 Q In your prior practice for Zurich had you provided</p>	<p style="text-align: right;">Page 28</p> <p>1 A Okay. I spoke with Bill on 3/27/15.</p> <p>2 Q Okay. And you -- what -- what do you recall of 3 that phone call?</p> <p>4 A I called Bill to advise him that we had been 5 contacted regarding this matter. I asked Bill a 6 little bit about the general background of the 7 case. He said, Make sure you do not assert advice 8 of counsel as a defense. And I think we discussed 9 the fact that they had carved out the bad faith 10 when they had their work comp resolution.</p> <p>11 Q Did he tell you why you shouldn't assert advice of 12 counsel?</p> <p>13 A Because I think he -- this would be my 14 speculation. Bill didn't believe they were 15 following his advice and that they were -- had a 16 problem with the underlying case.</p> <p>17 Q Yeah, I -- I don't want speculation. I want what 18 you can recall Bill actually told you.</p> <p>19 A Okay. I don't recall.</p> <p>20 Q Okay. What did he tell you about the carve-out?</p> <p>21 A I -- I can't tell you specifically. All I know is 22 I left the conversation with the understanding 23 that they had reserved, preserved, whatever term 24 you like, the work comp -- the bad faith case. 25 Excuse me.</p>

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<p style="text-align: right;">Page 33</p> <p>1 to pay benefits starting in May of 2012, correct?</p> <p>2 A What paragraph are you looking at?</p> <p>3 Q Starting on -- on page 2 --</p> <p>4 A Yes.</p> <p>5 Q -- paragraph 14, it says Zurich discontinued</p> <p>6 payments --</p> <p>7 A Oh.</p> <p>8 Q -- for plaintiff's medication.</p> <p>9 A I see that.</p> <p>10 Q And then if you go to paragraph 18, it says in May</p> <p>11 of 2012 Zurich agreed to pay for a doctor's visit.</p> <p>12 And what -- did -- did you do anything to -- to</p> <p>13 try and ascertain what happened in the interim?</p> <p>14 The three years between the discontinuance and the</p> <p>15 doctor's visit with Dr. Lawlor that's alleged</p> <p>16 there?</p> <p>17 A I don't have a recollection of that, no.</p> <p>18 MR. HOYT: Let's mark this as Exhibit 6.</p> <p>19 It's the underlying petition.</p> <p>20 (Whereupon, Exhibit 6 was then marked.)</p> <p>21 Q (BY MR. HOYT) This is the underlying worker's comp</p> <p>22 Petition for Hearing. Did you review this before</p> <p>23 you filed the Answer?</p> <p>24 A I don't know.</p> <p>25 Q It's most likely it was in the file provided to</p>	<p style="text-align: right;">Page 35</p> <p>1 that suggested possible affirmative defenses?</p> <p>2 A I don't recall reviewing it, so I don't have a</p> <p>3 recollection of anything it might suggest.</p> <p>4 Q If you look at the Answer, second page,</p> <p>5 paragraph 4, where it says, There exists a</p> <p>6 legitimate dispute as to whether claimant's</p> <p>7 present condition is in any way related to the</p> <p>8 work injury, isn't a legitimate dispute or a</p> <p>9 reasonable dispute a defense to bad faith?</p> <p>10 A It's --</p> <p>11 MR. SUTTON: Objection; form of the question.</p> <p>12 It's vague.</p> <p>13 Q (BY MR. HOYT) You can answer.</p> <p>14 A It could be a legitimate issue with regard to bad</p> <p>15 faith, but this is a work comp claim that's --</p> <p>16 hasn't even been litigated yet.</p> <p>17 Q True. But you were preparing an answer to the bad</p> <p>18 faith case, and so if there is a legitimate</p> <p>19 dispute in the underlying case about whether he</p> <p>20 was entitled to benefits or not, wouldn't that be</p> <p>21 a valid affirmative defense to raise?</p> <p>22 A The case as it existed at the time that Bill would</p> <p>23 have answered this versus the case that was</p> <p>24 presented to me were two different cases.</p> <p>25 Q I understand that. But I'm saying, as you an</p>
<p style="text-align: right;">Page 34</p> <p>1 you, correct?</p> <p>2 A I don't know that. I'm going to -- if -- if you</p> <p>3 say most likely, I'll agree with most likely.</p> <p>4 Q All right. Is that something that you believe you</p> <p>5 would have wanted to review before filing an</p> <p>6 answer in a bad faith case arising out of this?</p> <p>7 A Not necessarily.</p> <p>8 MR. HOYT: Let's mark this Exhibit 7, the</p> <p>9 Answer to the Petition for Hearing.</p> <p>10 (Whereupon, Exhibit 7 was then marked.)</p> <p>11 Q (BY MR. HOYT) This was -- this appears to you to be</p> <p>12 the Answer filed to that Petition we just looked</p> <p>13 at, correct?</p> <p>14 A It would appear to be.</p> <p>15 Q And do you believe you would have reviewed that</p> <p>16 before filing the answer in the bad faith case?</p> <p>17 A I don't know.</p> <p>18 Q Is it most likely you did?</p> <p>19 A I don't know.</p> <p>20 Q Is it likely that it was provided to you with the</p> <p>21 file materials to prepare to answer the bad faith</p> <p>22 case?</p> <p>23 A I don't know for a fact, but I'll go with most</p> <p>24 likely, sure.</p> <p>25 Q And do you -- do you recall seeing anything in it</p>	<p style="text-align: right;">Page 36</p> <p>1 attorney preparing an answer to the bad faith</p> <p>2 allegations arising out of this underlying</p> <p>3 worker's comp case, if there is a legitimate</p> <p>4 dispute as to whether the individual was entitled</p> <p>5 to benefits or not, isn't that a le -- isn't that</p> <p>6 a defense -- a possible defense --</p> <p>7 MR. SUTTON: Object --</p> <p>8 Q (BY MR. HOYT) -- to the bad faith claim?</p> <p>9 MR. SUTTON: Objection; we're now -- it's</p> <p>10 compound. If. It's speculative.</p> <p>11 A I would say that the -- the term legitimate</p> <p>12 dispute could give rise to a bad faith defense.</p> <p>13 In this instance, what I had looked at, I did not</p> <p>14 think it did.</p> <p>15 Q (BY MR. HOYT) So within 30 days of retention you</p> <p>16 had already come to the conclusion there was no</p> <p>17 legitimate dispute as to whether Leichtnam had</p> <p>18 been entitled to benefits?</p> <p>19 A I don't know what you mean by within 30 days.</p> <p>20 Q Well, the Answer was filed approximately 30,</p> <p>21 35 days after your retention.</p> <p>22 A Well, I was -- if that's what the timing is, yes.</p> <p>23 Q Did you tell the client that at any point in time?</p> <p>24 A Well, at some point in time I did.</p> <p>25 Q When?</p>

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<p style="text-align: right;">Page 37</p> <p>1 A I don't know. I wrote them an -- a long letter 2 explaining at a certain point in time where I 3 think the problems were with regard to this case, 4 and the fact that they had committed bad faith. 5 Q And you told them that you didn't see any 6 potential defenses? 7 A I -- whatever I said in the letter is what I said. 8 Q All right. We'll look at those. 9 MR. HOYT: Let's mark as Exhibit 8 -- is this 10 8? Yeah. A summary of medical exams, and this 11 may be part of what we were talking about earlier. 12 (Whereupon, Exhibit 8 was then marked.) 13 A Oh, I'm sorry. 14 Q (BY MR. HOYT) Does this appear to you to be one of 15 the summaries you were talking about that Beth 16 Young prepared? 17 A It is. 18 Q Okay. And do you recall the time frame that she 19 prepared this in? 20 A I do not. 21 Q Do you recall if you saw it before you filed the 22 Answer? 23 A I do not recall. 24 Q Do you recall that there was some disagreement 25 amongst the doctors as to the percentage of the --</p>	<p style="text-align: right;">Page 39</p> <p>1 insurer including any claim for permanent partial 2 or permanent total disability, temporary total 3 disability, temporary partial disability, 4 rehabilitation or retraining benefits, Cozine 5 benefits, benefits under the odd lot doctrine, 6 past, present medical expenses, attorneys' fees, 7 prejudgment interest, penalties, and costs. This 8 agreement shall constitute a full and final 9 release of any present and future claims the 10 claimant may have against employer and insurer 11 except those matters excepted herein. 12 And the matters that were excepted -- it 13 appears that the matters were ex -- that were 14 excepted were listed in item C and D above, 15 paragraph 7, if you look. 16 A Okay. 17 Q Was that how you read this? 18 A That's what it says. 19 Q Now, is there some reason why you didn't allege 20 this release as an affirmative defense? 21 A Because in my conversations with both full -- 22 Bill Fuller, he explained to me that he and 23 Dennis Finch had agreed to except out the bad 24 faith claim, which is very common practice. 25 Q Did he give you any documentation of that</p>
<p style="text-align: right;">Page 38</p> <p>1 the disability or injury attributable to the -- 2 the accident? 3 MR. SUTTON: Object to the form; it's vague 4 as to time. 5 Q (BY MR. HOYT) You can answer. 6 A Sure. I don't have a recollection of what the -- 7 they were saying at the time. I know I've seen 8 the document, but I don't know what my thought 9 would have been at that time or don't recall what 10 my thought was at the time. 11 MR. HOYT: Let's mark as Exhibit 9 the 12 Compromise, Settlement, and Order for Approval. 13 (Whereupon, Exhibit 9 was then marked.) 14 Q (BY MR. HOYT) The first question is, do you recall 15 receiving and reviewing this prior to filing the 16 Answer in the bad faith case? 17 A Do I recall it, no. Do I think I did, yes. 18 Q Okay. And if you go to page 3 -- 19 A Yes, sir. 20 Q -- paragraph 7 contains a rather general release. 21 And if you go over to the next page, subject to 22 matters that are excepted. So it says, Fully and 23 forever releases, discharges employer and insurer 24 of and from any and all claims he may now have or 25 hereafter may have against the employer and</p>	<p style="text-align: right;">Page 40</p> <p>1 discussion? 2 A Subsequently I recall receiving some email 3 exchanges between Dennis and Bill. 4 Q But before you filed the Answer you didn't have 5 that email? 6 A I don't know. Bill Fuller told me it had been 7 done, and if Bill Fuller tells me something, it 8 happened. 9 Q Now, if you look at the Complaint again, it's 10 Exhibit 5 -- or Exhibit 4. Wait. It's Exhibit -- 11 A I believe it's 2. 12 Q 2, yeah. And you look at what is prayed for -- or 13 is termed -- or what is claimed, his injuries, 14 that's in paragraph 27, I believe. Paragraph 27, 15 the harm alleged is delay in payment of his 16 medical expenses, delay and obstr -- and 17 obstruction of his medical care, loss and use of 18 benefits. All of those occurred before the 19 release, correct? 20 A I don't know, but it would seem to make sense, 21 yes. 22 Q And so regardless of whether the bad faith claim 23 was released, why didn't it occur to you that 24 there are some allegation -- alleged injuries or 25 whatever here that would be released or at least</p>

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<p style="text-align: right;">Page 45</p> <p>1 A Let me just catch up with you. 2 Q Sure. Go ahead and read that. 3 A Well, that would be true. It was done by way of 4 settlement. 5 Q So your -- your position was that because it was 6 settled and a settlement was approved, there was 7 no need for a determination of wrongful 8 withholding? 9 A Right. 10 Q In looking at that settlement, did you see any 11 admission in that settlement by Zurich that it had 12 wrongfully withheld benefits? 13 A I don't remember what's in the settlement, but I 14 don't recall any such thing. 15 Q In fact, if we look at it -- if you will look at 16 page 2, paragraph 5, it simply states -- states 17 that disputes exist? 18 A It does. 19 Q And you're free to look at this, but I don't 20 believe it says anywhere in this that Zurich 21 admits that it had wrongfully withheld those 22 benefits. In other words, that there was no 23 longer a dispute. 24 MR. SUTTON: Object to the form; that's 25 compound.</p>	<p style="text-align: right;">Page 47</p> <p>1 filed this answer that -- that Leichtnam had to 2 exhaust his administrative remedy with the 3 South Dakota Department of Labor? 4 A I think that he had exhausted his remedies by the 5 settlement. 6 Q Okay. And you were aware of no authority at that 7 time requiring an actual determination by the 8 board? 9 A Am -- was I aware of any then nor am I aware of 10 any now. I don't know one way or the other. 11 Q All right. You were not aware of it at the time 12 of filing the answer? 13 A Well, it was my opinion that it had been resolved. 14 Q What had been resolved? 15 A The underlying work comp claim, and approved by 16 the department. 17 Q But what -- it was your opinion at the time that 18 there was no need for him to get an actual 19 determination by the board of wrongful 20 withholding? 21 A That would be my opinion. 22 Q Were you aware of the South Dakota cases on that 23 point at the time of -- existing at the time you 24 filed your answer? 25 MR. SUTTON: Objection; that's vague.</p>
<p style="text-align: right;">Page 46</p> <p>1 Q (BY MR. HOYT) It never says in here that -- does 2 it, that Zurich withdraws its dispute or admits 3 that it was wrongful? 4 A I would be -- I -- I don't know. I haven't read 5 the entire thing, but I would presume that they 6 did not. 7 Q Okay. Prior to this case had you ever done 8 research of -- of what steps a claimant -- a 9 worker's comp bad faith claimant must take before 10 bringing the bad faith claim? 11 A I have -- I don't think I did any specific 12 research in that regard. But we have several 13 people that only do work comp -- worker's 14 compensation. And we routinely and regularly 15 visit about the -- the complexities of making sure 16 in handling of work comp cases that you're 17 touching all the bases. 18 Q Were you familiar with the requirement of 19 exhausting the administrative remedy -- 20 A I am -- 21 Q -- prior to bringing it? 22 A I'm sorry. 23 Q That's okay. 24 A I am familiar with the term. 25 Q And it was your understanding at the time you</p>	<p style="text-align: right;">Page 48</p> <p>1 A Not that I'm aware of. 2 Q (BY MR. HOYT) Did you ask anybody who had handled 3 worker's comp at your office about it? 4 A This is going to sound like I'm dancing around it, 5 but I don't know. This was several years ago so I 6 don't know the answer to that. 7 Q Okay. Had you heard of the case of Hein vs. 8 Acuity? 9 A No. 10 Q Had you heard of the case of Zuke vs. Presentation 11 Sisters? 12 A Not that I'm aware -- I don't rec -- recall -- or 13 I don't recognize those names. Pardon me. 14 Q Okay. Did you have available an associate at the 15 time you could have asked to research that -- that 16 issue? 17 A I'm sure I did. 18 Q But you didn't? 19 A I did not. Unless it shows in the billing 20 records. I don't know. 21 MR. HOYT: Let's mark as Exhibit 10 Zurich's 22 Motion For Leave To File Amended Answer. 23 (Whereupon, Exhibit 10 was then marked.) 24 MR. HOYT: Then I will also mark at the same 25 time Exhibit 11, Zurich's Brief in Support.</p>

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<p style="text-align: right;">Page 49</p> <p>1 (Whereupon, Exhibit 11 was then marked.) 2 MR. HOYT: And then I'm going to mark as 3 Exhibit 12 the Combined Reply Brief. 4 (Whereupon, Exhibit 12 was then marked.) 5 Q (BY MR. HOYT) All right. I'm going to have you 6 look briefly at these. So at some point the 7 Hinshaw Culbertson firm comes into this matter, 8 and we'll get in more detail into that, but they 9 work up Proposed Amendment to the Answer and a 10 Motion to Dismiss. And we're going to -- we're 11 looking at some of the documents, I believe, that 12 came about in that process. 13 But let me just ask you, do you recall 14 signing the -- the documents that are in front of 15 you that were the Motion to Amend and the briefing 16 that supported it? 17 A I -- I don't recall it, but I -- I know they 18 happened. 19 Q Yeah. And, well, in fact you can see your 20 signature on these documents, I believe. 21 A The electronic signature, yes. 22 Q Right. 23 A Yes, sir. I am not disputing that in any way, 24 form -- 25 Q Okay. And even though Hinshaw Culbertson came in</p>	<p style="text-align: right;">Page 51</p> <p>1 email you received February 1, 2018, referring to 2 attached motions for the pro hac? 3 A It would appear so. 4 Q And after -- after you pro hac'd them in, did you 5 re -- remain on the file? 6 A We -- they -- well, yes. As local counsel. 7 Q Okay. Let's go back to the billing records again. 8 A Sure. 9 Q Those are Exhibit 1, I believe. 10 MR. SUTTON: 2. 11 Q (BY MR. HOYT) 3. And if you look -- going to 12 2018 -- first of all, let me -- let me ask you. 13 After the first page we drop off at April 22 and 14 we don't pick up again until June 3. Are we 15 missing May billing records or just nothing went 16 on in May? 17 A I don't know the answer to that. I'm presuming 18 nothing went on or there would be a billing 19 record. But I don't know. 20 MR. HOYT: Counsel, do you know? 21 MR. SUTTON: I -- I can tell you that the 22 Bates stamp is sequential, so this is how I 23 received them. I'm assuming this is everything. 24 MR. HOYT: All right. 25 Q (BY MR. HOYT) So let's go to 2018.</p>
<p style="text-align: right;">Page 50</p> <p>1 you were still counsel of record on the matter at 2 the point in time that these were signed, correct? 3 A I wouldn't consider myself counsel of record. 4 That -- I -- they had taken over the case and they 5 were calling the shots. 6 Q As far as the Court was concerned, your name was 7 still on this matter? 8 A I agree with you. 9 Q Yeah. 10 A That's why I subsequently asked them to get their 11 pro hac vice motions in so that I wouldn't be. 12 Q Now, in -- in sponsoring them pro hac, what were 13 the requirements under South Dakota law for your 14 continuation on the matter? 15 A I have to appear at proceedings and I have to sign 16 the pleadings until they are pro hac'd in. Absent 17 of a friendship, if you will, professional one, I 18 wouldn't have been local counsel. 19 Q And it looks like -- if we go to -- 20 MR. HOYT: Well, mark this as Exhibit 13. 21 It's a email of February 1, 2018, referring to 22 pro hac. 23 (Whereupon, Exhibit 13 was then marked.) 24 A Thank you. 25 Q (BY MR. HOYT) And this -- this appears to be an</p>	<p style="text-align: right;">Page 52</p> <p>1 A Yes, sir. 2 Q And look at -- there is a Bates page 46, GPNA -- 3 A Yes, sir -- 4 Q -- 46. 5 A I've got it. 6 Q Up at the top there is an entry of January 9, 7 2018. It says, Telephone conference with 8 Dawn Wagner regarding counsel replacement issues. 9 Do you recall that discussion? 10 A I do not. 11 Q Do you recall her telling you that they were 12 bringing Hinshaw & Culbertson in? 13 A Oh, I do remember that. Certainly. 14 Q Did she tell you why? 15 A If she did, I don't recall. 16 Q Okay. And then if you go down to January 17, Work 17 on lengthy response to email from Mr. Glazer 18 regarding status of the case and draft a letter to 19 Glazer. What do you recall about that letter? 20 A I don't recall anything. I didn't draft the 21 letter. 22 Q Who is KAC? 23 A Katelyn Cook. 24 Q And Beth Young also worked on the letter -- or 25 looks like she worked on the letter?</p>

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<p>1 Q Were you aware of anything -- any case, Zuke or 2 otherwise, that held that it was enough of an 3 exhaustive administrative remedy if the claim had 4 reached the final stages of the administrative 5 process?</p> <p>6 A I wasn't aware of anything.</p> <p>7 Q Do you know whether Zuke even holds that?</p> <p>8 A As we sit here today, I do not.</p> <p>9 MR. HOYT: Let's mark that Exhibit 15, Order 10 Denying Zurich's Motion. (Whereupon, Exhibit 15 was then marked.)</p> <p>11 Q (BY MR. HOYT) Do you recall seeing this Order?</p> <p>12 A I know that I saw it, yes.</p> <p>13 Q This was the Order denying Zurich's motion to 14 dismiss and motion to amend to add the affirmative 15 defenses, correct?</p> <p>16 A This is a motion -- it's an Order Denying Zurich's 17 Motion For Leave To File An Amended Answer, yes, 18 sir.</p> <p>19 Q Okay.</p> <p>20 MR. SUTTON: It's a separate order on the --</p> <p>21 MR. HOYT: Right.</p> <p>22 Q (BY MR. HOYT) You understand that the Motion to 23 Dismiss also was denied?</p> <p>24 A I do.</p>	<p>1 Q Okay. So Finch asked Fuller to remove language 2 that specifically releases the bad faith claim 3 and -- and Fuller/Zurich complies. Is that your 4 understanding?</p> <p>5 A That's what -- that's what Dennis is asking here.</p> <p>6 Q And -- and Zurich did remove it?</p> <p>7 A I -- I presume that they did.</p> <p>8 Q Well, we looked at the release.</p> <p>9 A Well, I don't remember what the release said. I'm 10 sorry, sir.</p> <p>11 Q Okay. Now, your understanding -- is it your 12 understanding that it's bad faith to ask for a 13 release that would include bad faith?</p> <p>14 A Yes.</p> <p>15 Q Or is it bad faith to condition payment of 16 benefits on a release of bad faith?</p> <p>17 A I view both as being bad faith.</p> <p>18 Q So simply to ask for it is bad faith in your view?</p> <p>19 A That's -- when I'm trying to settle cases, I don't 20 use those terms. I -- I use terms so that if 21 we're going to settle the case, I say we're going 22 to settle on a global basis, meaning it's a 23 complete resolution of all claims, and that global 24 basis is understood.</p> <p>25 Q But it's your understanding Zurich did not insist</p>
<p>1 Q And this -- this -- the Court denied the motion 2 without reaching the merits of any of the defenses 3 that were attempting to be added, correct?</p> <p>4 MR. SUTTON: In Exhibit 15?</p> <p>5 MR. HOYT: Yes.</p> <p>6 A I don't know without reading the entire Order.</p> <p>7 Q (BY MR. HOYT) Well, it's your understanding, isn't 8 it, that the Court held that the motion was simply 9 untimely?</p> <p>10 A I knew the Court said the motion was untimely, 11 correct.</p> <p>12 Q And that no adequate explanation had been given 13 for a three-year delay and amending?</p> <p>14 A I know that the Court denied it as not timely.</p> <p>15 Q Well, the fact is that -- that you had missed the 16 deadline to amend by some three years.</p> <p>17 A If that's what the deadline said.</p> <p>18 (Whereupon, Exhibit 16 was then marked.)</p> <p>19 Q (BY MR. HOYT) Let's look at Exhibit 16. It's an 20 email of June 6, 2013. Is this the email I 21 believe you said you ultimately saw that reflected 22 the exchange between attorney Finch and 23 attorney Fuller on the bad faith release?</p> <p>24 A I don't know if this is it or not. It certainly 25 is an email that addresses that issue.</p>	<p>1 upon or condition the settlement with Leichtnam on 2 a release of bad faith?</p> <p>3 A I don't know what they did.</p> <p>4 Q Well, we can look at the release again.</p> <p>5 A Well, I understand they signed the release. I 6 don't -- I don't know what discussions might have 7 had regarding conditioning the release. I'm not 8 trying to be cute.</p> <p>9 Q But it's your understanding that the release that 10 was ultimately signed that we looked at did not 11 release bad faith?</p> <p>12 A Yes.</p> <p>13 Q And so Zurich did not condition that settlement 14 upon a release of bad faith?</p> <p>15 A It's been removed from the release. I don't know 16 about conditioning.</p> <p>17 Q And they didn't -- they did not insist upon that 18 release in order to settle?</p> <p>19 A They removed it from the release language.</p> <p>20 Q And so what -- what would the harm be in terms of 21 bad faith harm in Zurich asking for it but 22 removing it?</p> <p>23 MR. SUTTON: Object to the form of the 24 question.</p> <p>25 A If they removed it, I mean, probably not a harm.</p>

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<p style="text-align: right;">Page 69</p> <p>1 (Whereupon, Exhibit 19 was then marked.)</p> <p>2 Q (BY MR. HOYT) So this was a letter that you</p> <p>3 received wherein Mr. Abourezk offered to settle</p> <p>4 for \$325,000?</p> <p>5 A That's correct.</p> <p>6 Q And this was roughly -- let's see -- one, two --</p> <p>7 four months or so after the -- the case had been</p> <p>8 filed?</p> <p>9 A Sounds reasonable.</p> <p>10 Q And your -- you suggested to Dawn Wagner that she</p> <p>11 consider this; is that correct?</p> <p>12 A I considered -- I suggested she consider it and</p> <p>13 that I -- and I -- yes, I suggested she consider</p> <p>14 it at that.</p> <p>15 Q You didn't propose any specific counter, though;</p> <p>16 is that correct?</p> <p>17 A I suggested a counter-proposal to my client as to</p> <p>18 what I thought the case could settle for.</p> <p>19 Q What was that?</p> <p>20 A 300,000.</p> <p>21 MR. HOYT: Let's mark as -- yeah, let me see</p> <p>22 if I want to go there.</p> <p>23 Exhibit 20 is the September 28, 2015 --</p> <p>24 (Whereupon, Exhibit 20 was then marked.)</p> <p>25 A Thank you.</p>	<p style="text-align: right;">Page 71</p> <p>1 Q And so the last email we looked at where she's</p> <p>2 asking for details was September 28. This one is</p> <p>3 in December, December 15, and it appears you still</p> <p>4 have not provided the -- the items she asked for;</p> <p>5 is that correct?</p> <p>6 MR. SUTTON: I'm going to object to the form;</p> <p>7 it's a compound question.</p> <p>8 Q (BY MR. HOYT) This is December 15. So we're</p> <p>9 roughly 3 months later from the email we just</p> <p>10 looked at, correct?</p> <p>11 A Yes, it -- it is.</p> <p>12 Q And she's still asking for your initial evaluation</p> <p>13 in order to explore early resolution?</p> <p>14 A That's what it says.</p> <p>15 Q Any reason why you hadn't provided it before this?</p> <p>16 A I don't have a reason.</p> <p>17 MR. SUTTON: Other than in the letters?</p> <p>18 MR. HOYT: That's not an objection, Counsel.</p> <p>19 That's testimony.</p> <p>20 MR. SUTTON: Misstates the record. That's</p> <p>21 the objection.</p> <p>22 MR. HOYT: Well, that -- that just doesn't</p> <p>23 even make any sense.</p> <p>24 Anyway, let's look at Exhibit 22,</p> <p>25 December 23, 2015.</p>
<p style="text-align: right;">Page 70</p> <p>1 Q (BY MR. HOYT) So this is a response from</p> <p>2 Dawn Wagner where she thanks you for passing on</p> <p>3 the demand but she tells you that she's going to</p> <p>4 need certain things from you before she can</p> <p>5 discuss with management and seek possible</p> <p>6 authority to address that -- that offer, correct?</p> <p>7 MR. SUTTON: Object to the form of the</p> <p>8 question.</p> <p>9 A In general, that's what she's saying.</p> <p>10 Q (BY MR. HOYT) And she's asking for, among other</p> <p>11 things -- it says here your initial review of the</p> <p>12 file, timeline summary, standard the plaintiff has</p> <p>13 to prove, your recommendation on chance of</p> <p>14 success. And so you understood she was asking for</p> <p>15 those things in order for her to even be able to</p> <p>16 consider that demand -- that offer?</p> <p>17 A That's what it says.</p> <p>18 MR. HOYT: And let's mark as Exhibit 21 a</p> <p>19 email exchange of December 15, 2015.</p> <p>20 (Whereupon, Exhibit 21 was then marked.)</p> <p>21 Q (BY MR. HOYT) Actually, I want you to look at the</p> <p>22 second page of that --</p> <p>23 A Okay.</p> <p>24 Q -- the email of December 15 from Dawn to you.</p> <p>25 A Okay.</p>	<p style="text-align: right;">Page 72</p> <p>1 (Whereupon, Exhibit 22 was then marked.)</p> <p>2 Q (BY MR. HOYT) So this appears to be your response</p> <p>3 to Dawn Wagner's request for the -- the items that</p> <p>4 we had looked at; is that correct?</p> <p>5 A I will -- in general, probably, yes.</p> <p>6 Q And the second paragraph you say, I do think this</p> <p>7 is a case we should attempt to settle. Dawn</p> <p>8 Wagner had already told you she's -- she was</p> <p>9 interested in that, correct?</p> <p>10 A I'm -- sure.</p> <p>11 Q She -- she told you in the emails we looked at she</p> <p>12 was interested in an early -- possible early</p> <p>13 resolution, correct?</p> <p>14 A I don't know that I remember early resolution. I</p> <p>15 know that she wanted further information to follow</p> <p>16 up on Mike's demand.</p> <p>17 Q If you'll look at the second page, one, two,</p> <p>18 three, four -- four paragraphs down, you tell her,</p> <p>19 I advise insurers in bad faith cases that the</p> <p>20 value of the case is basically what you are</p> <p>21 willing to pay to get rid of a claim. Did you</p> <p>22 consider that responsive to her request for an</p> <p>23 evaluation of what the case value was?</p> <p>24 A I considered it something that was my opinion on</p> <p>25 having dealt with bad faith cases in South Dakota,</p>

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<p>1 especially with Mike Abourezk.</p> <p>2 Q Did you consider that would be helpful to</p> <p>3 Dawn Wagner discussing with management what they</p> <p>4 should pay on this case?</p> <p>5 A I thought it was.</p> <p>6 Q Pay whatever you're willing?</p> <p>7 A It's consideration in bad faith cases.</p> <p>8 Q I don't see in here any evaluation of particular</p> <p>9 strengths of the case. Were there -- did you --</p> <p>10 did you ever analyze for Dawn Wagner in her --</p> <p>11 response to her request any strengths to the case?</p> <p>12 A Not that I recall.</p> <p>13 Q And is that because you had already concluded that</p> <p>14 Zurich had in fact committed bad faith?</p> <p>15 A Well, I had concluded that I felt that there was a</p> <p>16 bad -- would be a finding of bad faith, and I was</p> <p>17 trying to find a way to help them get out as quick</p> <p>18 as they could before they got into a discovery</p> <p>19 morass.</p> <p>20 MR. HOYT: Let's mark as Exhibit 23 email of</p> <p>21 January 6, 2016.</p> <p>22 (Whereupon, Exhibit 23 was then marked.)</p> <p>23 Q (BY MR. HOYT) So this was a -- a response from</p> <p>24 Dawn Wagner to your December 23 in which she</p> <p>25 thanks you for the high-level analysis but she</p>	<p>1 Q And then on the next page at the top she says,</p> <p>2 What are the strengths of our case. You were</p> <p>3 never able to identify any; is that correct?</p> <p>4 A Not that I recall.</p> <p>5 Q Your expert did, though, correct?</p> <p>6 A Sure.</p> <p>7 Q Item 4 is plaintiff's wrongful termination case.</p> <p>8 What -- did you learn anything about that?</p> <p>9 A No.</p> <p>10 Q What would the relevance of that be?</p> <p>11 A I don't know.</p> <p>12 Q Could that go to his credibility?</p> <p>13 A I don't know.</p> <p>14 Q Or litigiousness?</p> <p>15 A I don't know.</p> <p>16 Q What exhibit was that one again?</p> <p>17 A 23.</p> <p>18 Q 23. I can't keep these straight.</p> <p>19 A I'm assisting Tina here today.</p> <p>20 Q Yeah.</p> <p>21 MR. HOYT: Let's mark as Exhibit 24</p> <p>22 February 1, 2016.</p> <p>23 (Whereupon, Exhibit 24 was then marked.)</p> <p>24 A Thank you.</p> <p>25 Q (BY MR. HOYT) This was your -- your response to the</p>
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<p>1 needs the details she asked for, a more in-depth</p> <p>2 analysis, correct?</p> <p>3 A It would appear that that's correct.</p> <p>4 Q And item one she says an overview of the</p> <p>5 plaintiff's medical timeline which includes prior</p> <p>6 injuries. What did you know about that at the</p> <p>7 time, any prior injuries by this plaintiff?</p> <p>8 A I don't know if I knew of any.</p> <p>9 Q What would the relevance of that be?</p> <p>10 A I -- I'm not sure I know.</p> <p>11 Q Wouldn't that go to causation in terms of what was</p> <p>12 actually attributable to the accident in question</p> <p>13 versus preexisting?</p> <p>14 A Well, it could.</p> <p>15 Q Did you take any discovery on that?</p> <p>16 A No.</p> <p>17 Q Item two, it says, Liability analysis, in addition</p> <p>18 to any gaps or delays in treatment in -- any other</p> <p>19 actions or inactions by Zurich that would be</p> <p>20 problematic. Were there -- were you aware of any</p> <p>21 gaps or delays in treatment that were attributable</p> <p>22 to -- to Leichtnam simply not seeking treatment?</p> <p>23 A I don't know.</p> <p>24 Q Did you try taking any discovery on that?</p> <p>25 A No.</p>	<p>1 request we just looked at for a more detailed</p> <p>2 analysis to Dawn Wagner; is that correct?</p> <p>3 A Yes, it would appear to be.</p> <p>4 Q So if you go to the second page of this, you note</p> <p>5 in the middle paragraph there was inconsistency in</p> <p>6 the IMEs. Do you see that?</p> <p>7 A I do.</p> <p>8 Q That was not just between Farnham and the other</p> <p>9 two doctors, correct? There was inconsistency</p> <p>10 even between Anderson and Blow?</p> <p>11 MR. SUTTON: Object to the form of the</p> <p>12 question.</p> <p>13 Q (BY MR. HOYT) One of them had a 10 percent and the</p> <p>14 other had a 5 percent in terms of the amount</p> <p>15 attributable to the accident -- disability,</p> <p>16 correct?</p> <p>17 A I don't remember the percentages, but they had a</p> <p>18 different percentage, that's true.</p> <p>19 Q You also make the observation, I don't know how</p> <p>20 the claims representative will hold up in a</p> <p>21 deposition regarding the decision to cease</p> <p>22 benefits so abruptly. Who was that claim</p> <p>23 representative?</p> <p>24 A I'm sorry. Can you tell me where you're reading</p> <p>25 from?</p>

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<p style="text-align: right;">Page 77</p> <p>1 Q Yeah. It's right above the subheading, Why was 2 the offer of settlement in the amount of 1,500. 3 Go up above that, that last -- that paragraph 4 above that. You say, However, I don't know how 5 the claims representative will hold up in a 6 deposition. We're on page 2.</p> <p>7 A Right.</p> <p>8 Q It's right -- right in there (indicating).</p> <p>9 A Oh. Thank you. I -- yeah, no, as I sit here 10 today I don't know that I can tell you exactly 11 what I was thinking at the time. But there must 12 have been something that gave me some pause that 13 was in the file as to how the claims 14 representative was going to present all of that.</p> <p>15 Q Did you ever try and interview -- interview them?</p> <p>16 A Not to my knowledge.</p> <p>17 Q On page 3 --</p> <p>18 A Yes.</p> <p>19 Q -- it says -- at the top there is a question, Did 20 Bill Fuller believe Mr. Leichtnam would be 21 perceived as a sympathetic witness. You respond, 22 I have not connected with Mr. Fuller to discuss 23 his perceptions of Mr. Leichtnam during his 24 deposition. Did you ever ask Bill Fuller about 25 Leichtnam's credibility as a witness?</p>	<p style="text-align: right;">Page 79</p> <p>1 A Yes. 2 Q -- of the analysis of the demand -- 3 A Yes. 4 Q -- second paragraph under Analysis of Demand, 5 here -- down at the bottom of that paragraph, 6 Obviously Bill thought there were issues with 7 potential bad faith developing and candidly, in 8 the review of the case, there is clearly going to 9 be a finding of bad faith. So Fuller thought 10 potentially there was bad faith, but you were 11 convinced of it?</p> <p>12 A That's what I said. 13 Pardon me. 14 MR. HOYT: Let's mark this as Exhibit 25, 15 April 8, 2016. 16 (Whereupon, Exhibit 25 was then marked.) 17 Q (BY MR. HOYT) This is a letter you sent to 18 Dawn Wagner on April 8, 2016? 19 A It is. 20 Q So you say in this, I spent -- I've spent a lot of 21 time thinking about this file and how to approach 22 it. It appears that all of your focus, though, to 23 this point had been on trying to settle it; is 24 that correct? 25 A Most certainly was a major focus.</p>
<p style="text-align: right;">Page 78</p> <p>1 A I don't know. Bill and I had a num -- several 2 conversations, so I candidly don't know. Other 3 than what I recited here regarding Mr. Leichtnam.</p> <p>4 Q Where did you get that characterization of 5 Leicht -- Leichtnam's deposition? Was that in 6 claim notes?</p> <p>7 A No. Bill Fuller told me.</p> <p>8 Q Because it says, However, following 9 Mr. Leichtnam's deposition Mr. Fuller reported to 10 the claims representative that Mr. Leichtnam was 11 articulate and fairly witty?</p> <p>12 A Right.</p> <p>13 Q That wouldn't be a direct statement to you, that 14 was to the claim rep, correct?</p> <p>15 A Well, true, but Bill reported that same thing to 16 me.</p> <p>17 Q In a phone call?</p> <p>18 A Yeah.</p> <p>19 Q Down at the bottom with regard to the plaintiff's 20 wrongful termination case you say I am unaware of 21 the wrongful termination case or who is handling 22 same. I'll do some digging. Did you ever dig -- 23 do the digging?</p> <p>24 A Not that I'm aware of.</p> <p>25 Q So if we look at page 4 --</p>	<p style="text-align: right;">Page 80</p> <p>1 Q I have -- I -- did you spend any time thinking 2 about discovery to take?</p> <p>3 A Oh, I'm sure I thought about it.</p> <p>4 Q But you didn't do any?</p> <p>5 A I did not.</p> <p>6 Q And what was your thinking about a defense 7 strategy?</p> <p>8 A Well, we were ready -- in my opinion we were going 9 to have to rely on Charlie Henderson to carry the 10 day with his opinions regarding the bad faith.</p> <p>11 Q Did it occur to you that it would appear to Mike 12 Abourezk that Zurich was desperate to settle with 13 all of the communications being solely focused on 14 settling?</p> <p>15 A No.</p> <p>16 MR. HOYT: Let's mark as Exhibit 26, 17 April 27, 2016. 18 (Whereupon, Exhibit 26 was then marked.)</p> <p>19 Q (BY MR. HOYT) This is a letter from you to 20 Mr. Abourezk, and you said, My client would like 21 to get together and try to settle this claim. Did 22 you have any follow-up phone conversations with 23 him after this about -- about getting together to 24 talk settlement?</p> <p>25 A With Mike?</p>

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<p>1 Q Right.</p> <p>2 A I'm -- I don't know.</p> <p>3 Q Did he tell you that the prior offer of 325,000</p> <p>4 was off the table at this point?</p> <p>5 A At some point Mike told me he was going to</p> <p>6 increase his demand.</p> <p>7 Q Well, he said it in a letter -- in the initial</p> <p>8 offer letter, right? He said if it goes too</p> <p>9 far --</p> <p>10 A Yeah.</p> <p>11 Q -- he's going to raise it. Did he tell you --</p> <p>12 tell it to you again at some point?</p> <p>13 A I don't know.</p> <p>14 Q Did you give Dawn Wagner a timeline of when you</p> <p>15 felt she needed to accept that offer if she was</p> <p>16 going to accept it or risk that it was going to</p> <p>17 escalate?</p> <p>18 A I didn't give her a timeline.</p> <p>19 MR. HOYT: Let's mark this as Exhibit 27,</p> <p>20 June 10, 2016.</p> <p>21 (Whereupon, Exhibit 27 was then marked.)</p> <p>22 Q (BY MR. HOYT) It's another letter from you to</p> <p>23 Mr. Abourezk June 10, 2016?</p> <p>24 A It is.</p> <p>25 Q Down near the bottom you say, I know my client</p>	<p>1 Q Second paragraph at the very end.</p> <p>2 A Yes.</p> <p>3 Q It says, Zurich denies any wrongdoing and disputes</p> <p>4 the nature and extent of Leichtnam's alleged</p> <p>5 damages. What -- what did you develop in</p> <p>6 discovery or the evidence to challenge the extent</p> <p>7 of his injuries or damages?</p> <p>8 A Where were you looking?</p> <p>9 Q Under the introduction.</p> <p>10 A Oh, under introduction. I'm sorry.</p> <p>11 Q Second paragraph. Zurich denies any wrongdoing</p> <p>12 and dispute the nature and extent of Leichtnam's</p> <p>13 alleged damages. The fact is you didn't take any</p> <p>14 discovery to challenge his alleged damages,</p> <p>15 correct?</p> <p>16 A To that point, yeah, that's right.</p> <p>17 Q And you didn't do any discovery after this point?</p> <p>18 A Not while I was in control of the case, true.</p> <p>19 Q On page 3 you note there that, this paragraph, the</p> <p>20 inconsistency between Mr. Anderson's impairment</p> <p>21 percentage and Dr. Blow's. Do you see that?</p> <p>22 A Are you talking about at the top of the page?</p> <p>23 Q Yes.</p> <p>24 A Okay. Yes.</p> <p>25 Q If you look at page 5 --</p>
<p>1 would like to settle the case. So none of this</p> <p>2 occurred to you as appearing to be desperation on</p> <p>3 the part of Zurich that you're eager to settle?</p> <p>4 A Not in the slightest.</p> <p>5 Q Wouldn't it have been better strategy to have some</p> <p>6 discovery hanging over his head when you suggest</p> <p>7 that you want to get together and talk settlement?</p> <p>8 A No.</p> <p>9 MR. HOYT: Let's mark as Exhibit 28,</p> <p>10 Mediation Position Statement.</p> <p>11 (Whereupon, Exhibit 28 was then marked.)</p> <p>12 Q (BY MR. HOYT) This was a mediation statement that</p> <p>13 you submitted for the mediation in this matter?</p> <p>14 A It was.</p> <p>15 Q Did you draft this?</p> <p>16 A In -- in large measure.</p> <p>17 Q Who assisted you?</p> <p>18 A It would have been Jana Smoot White, and Beth</p> <p>19 Young would have also participated.</p> <p>20 Q Okay. Is there some reason why you didn't engage</p> <p>21 or recommend engaging Mr. Henderson earlier in</p> <p>22 this case? For example, prior to the mediation.</p> <p>23 A I don't know.</p> <p>24 Q If you'll look at the second page of this.</p> <p>25 A Sure.</p>	<p>1 A Pardon me. Yes, sir.</p> <p>2 Q -- the first full paragraph there says, Zurich</p> <p>3 believed Leichtnam was at MMI -- can you tell the</p> <p>4 jury what that means?</p> <p>5 A Maximum medical improvement.</p> <p>6 Q -- in the spring of 2009 per his previous IME --</p> <p>7 and IME refers to?</p> <p>8 A Independent medical evaluation.</p> <p>9 Q -- reports. He had not sought any physician</p> <p>10 appointments for six months. It was only after</p> <p>11 his employment was terminated that Leichtnam began</p> <p>12 seeking additional treatment. Due to this</p> <p>13 inconsistency Zurich arranged for another IME.</p> <p>14 That was -- that was -- that inconsistency, that's</p> <p>15 something that could have been developed in a</p> <p>16 deposition of Leichtnam, correct?</p> <p>17 A Could have.</p> <p>18 Q And it could have affected his credibility?</p> <p>19 A In the concept of anything, sure.</p> <p>20 Q Did you come up with any explanation for why he</p> <p>21 hadn't sought any doctors' appointments until</p> <p>22 after he was terminated from employment?</p> <p>23 A I don't have any recollection of that.</p> <p>24 Q But that inconsistency you believe was a regional</p> <p>25 base -- reasonable basis for Zurich to arrange for</p>

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<p style="text-align: right;">Page 89</p> <p>1 Q We're in that same exhibit. 2 A Oh, I'm sorry. 3 Q Page 11. 4 A Okay. 5 Q This -- and this is asking about any prior 6 malpractice cases. And there is a reference to 7 some documents. And, frankly, I can't remember 8 what those documents are. What -- what was the 9 reference there? What prior malpractice claims? 10 A I do not know. 11 Q Have you had prior malpractice claims against you? 12 A No. 13 Q I think we may have covered this, but did you 14 interview any of the claim individuals identified 15 in that Interrogatory No. 1? 16 A I did not. Let me just say this. Not that I 17 remember. I don't think I did, but I don't -- 18 Q So you don't recall actually trying to get the 19 version of the events from the claim people? 20 A I do not. 21 MR. HOYT: Let's mark this as Exhibit 30. 22 It's a email on January 4, 2018. 23 (Whereupon, Exhibit 30 was then marked.) 24 A Oh, thanks. Excuse me. 25 Q (BY MR. HOYT) So this is an email you received from</p>	<p style="text-align: right;">Page 91</p> <p>1 discovery -- or submit any discovery requests? 2 A Just a second. I have to read that again, please. 3 No, I did not. 4 MR. HOYT: Let's mark this as Exhibit 31. 5 It's a February 27, 2017, email. 6 (Whereupon, Exhibit 31 was then marked.) 7 Q (BY MR. HOYT) This is an email you received from 8 Dawn Wagner on February 27, 2017? 9 A Yep. I'm sorry. Yes. 10 Q And down at the bottom her email says, Have we 11 taken the plaintiff's deposition yet? What is the 12 deadline for oral discovery completion? Your 13 response is, Thanks. We have not taken depo. 14 Discovery deadline is 7/19. So you knew that Dawn 15 felt it important to take the plaintiff's 16 deposition. Why didn't you just tell her that you 17 didn't intend to? 18 MR. SUTTON: Object to the form of that 19 question. 20 Q (BY MR. HOYT) Well, you -- you could tell because 21 she made several requests about the plaintiff's 22 deposition. So it was your belief it was 23 important to her that that deposition be taken, 24 correct? 25 A It would appear so, yes.</p>
<p style="text-align: right;">Page 90</p> <p>1 Dawn Wagner on January 4, 2018? 2 A It would. 3 Q And she's asking for an outline on your defense 4 strategy going forward with regard to our 5 discovery request, key witnesses. And she says, 6 Would like to know when you plan on deposing the 7 plaintiff and/or conducting additional 8 investigation. So to this point you still have 9 not given her an outline of a defense strategy? 10 A Boy, I don't -- I don't know. There -- there are 11 those letters where we went back and attempted to 12 answer her questions, but based on what she's 13 saying there, it would seem that she doesn't think 14 I have done that to date. 15 Q And she wants to know when you plan on deposing 16 the plaintiff. The truth is you never planned on 17 deposing the plaintiff, did you? 18 A Not re -- no, I did not. 19 Q And did you -- but you never just told her that, 20 that I'm not going to take the deposition, did 21 you? 22 A I don't know. We had a lot of conversations. 23 Q And she's -- she wants to know about defense 24 strategy with regard to our discovery request. 25 Did you ever tell her you didn't plan to take any</p>	<p style="text-align: right;">Page 92</p> <p>1 Q And you say, Thanks. We have not taken depo. But 2 then you say the discovery deadline. Didn't you 3 think that would suggest to her that you were 4 going to do it before the deadline? 5 A Well, I was telling her that that opportunity 6 would exist until that time. 7 Q But you had already decided you were not going to 8 take it? 9 A I didn't think we needed to at that time, correct. 10 Q But you didn't tell her, I don't think we need to? 11 A I -- not that I can tell from what you've shown 12 me. 13 Q Well, in anything else that you can recall? 14 A I can -- I do not recall that many things from 15 back then. 16 MR. HOYT: This is Exhibit 32. It's a 17 December 7, 2017 -- 18 (Whereupon, Exhibit 32 was then marked.) 19 THE WITNESS: Did you intend to give this to 20 Jason? 21 MR. HOYT: Oh, yes. 22 MR. SUTTON: Thank you. 23 Q (BY MR. HOYT) It's another email from Dawn Wagner 24 to Kristi Wood at this point. I don't -- Kristi 25 Wood, again, who was that?</p>